

SHIRLEY A. CLARK

IBLA 83-751

Decided November 7, 1983

Appeal from decision of the California State Office, Bureau of Land Management, rejecting Indian allotment application CA 13435.

Affirmed.

1. Act of June 25, 1910--Indian Allotments on Public Domain:
Classification--Indian Allotments on Public Domain: Lands Subject to

When an application is for an allotment under the provisions of 25 U.S.C. § 337 (1976), the application is referred to the Secretary of Agriculture for a determination as to whether the lands are more valuable for agricultural or grazing purposes than for the timber found thereon, the Department of the Interior is bound by the determination of the Secretary of Agriculture and is constrained to follow that decision.

2. Act of June 25, 1910--Indian Allotments on Public Domain: Lands Subject to--Withdrawals and Reservations: Powersites

Land included in an application for powersite development under the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), shall from the date of filing of the application be reserved from entry, location, or other disposal under the laws of the United States, unless otherwise directed by the Federal Power Commission or by Congress. No rights may be acquired by a settler on the public land who initiates settlement at a time when the land is not open to entry.

APPEARANCES: Shirley A. Clark, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Shirley A. Clark has appealed from a decision dated May 5, 1983, rejecting her Indian allotment application CA 13435 filed on December 16, 1982, for land within the Six Rivers National Forest, Humboldt County, California. The application was filed pursuant to section 4 of the General Allotment Act, 25 U.S.C. § 334 (1976), and section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1976). The land applied for was described as the SW 1/4 NE 1/4 sec. 9, T. 11 N., R. 6 E., Humboldt meridian.

This Board has considered the actions of the State Office rejecting an Indian allotment application with respect to land in the NE 1/4 NE 1/4 sec. 9, T. 11 N., R. 6 E., Mount Diablo meridian on a previous occasion. As a result of our previous review this Board issued two decisions. In the first decision, Donald E. Miller, 2 IBLA 309 (1971), the Board affirmed the actions of the State Director rejecting the Indian allotment application filed by Miller. This first Miller decision was rendered at a time that a suit was pending in the Federal District Court regarding the basis for the determination by the Secretary of Agriculture that the land was more valuable for forest purposes than for agriculture or grazing. The district court subsequently ruled that the decision of the State Director and this Board was premature, as the decision should be rendered only after a proper determination by the Department of Agriculture. ^{1/} Following the court decision and the subsequent decision by the Department of Agriculture this Board once again considered a decision of the State Office rejecting the Miller application. In the determination by this Board in the second Miller case, Donald E. Miller, 15 IBLA 95 (1974), this Board noted that the Secretary of Agriculture had determined that the land "was not more valuable for agriculture or grazing purposes than for the timber thereon." The second Miller decision also noted that the land was not open for entry as it had been withdrawn for powersite purposes. The Federal district court subsequently affirmed. Miller v. United States, Civil No. C-70 2328 WTS (N.D. Cal. Feb. 6, 1975).

In this case, Clark's application was submitted to the Department of Agriculture together with a request that the Department of Agriculture submit a report concerning the application. In response to the request the Department of Agriculture recommended that the application be rejected because "[t]he land is not suitable for agriculture or economic grazing and is basically timber producing in nature." The response also noted that the land remained subject to the powersite and general withdrawal, Executive Order No. 6910, 54 I.D. 539 (Nov. 26, 1934). Following the receipt of the Department of Agriculture recommendation, the State Director issued a decision rejecting the application filed by Clark. The State Director decision states, in pertinent part:

[T]he land applied for is withdrawn from entry by Executive Order dated April 13, 1912, for Powersite Reserve No. 258 under the Act of June 25, 1910, as amended (36 Stat. 847); and by Departmental Order of November 12, 1920, under Sec. 24 of the Act of June 10, 1920 (41 Stat. 1063). Therefore, the subject lands are withdrawn from the operation of the public land laws, including the Indian allotment laws.

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To further substantiate the rejection of application CA 13435, the Forest Service has determined that the land applied for is chiefly valuable for the timber found thereon, and for this reason alone, such a finding requires that an application be rejected by this Department.

^{1/} Miller v. United States, Civ. No. 70-2328 (N.D. Cal. July 5, 1973).

In her statement of reasons, appellant asserts that the land has been subject to entry before, that it is not valuable for timber, and that she is working hard to improve the land.

[1] Section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1976), provides for the discretionary allotment by the Secretary of the Interior of those lands within the national forests which the Secretary of Agriculture has determined "are more valuable for agriculture or grazing purposes than for timber found thereon." Applications filed pursuant to 25 U.S.C. § 337 (1976) are referred to the Secretary of Agriculture for a determination as to whether the lands are more valuable for agricultural or grazing purposes than for the timber found thereon. The Department of the Interior is bound by the determination of the Secretary of Agriculture and is constrained to follow it. Donald E. Miller, 15 IBLA 95 (1974); Junior Walter Daugherty, 7 IBLA 291 (1972). ^{2/} The Secretary of Agriculture has found the land to be more valuable for the timber contained and, as in the previous Miller case, we are once again constrained to follow that determination.

[2] Section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1976), provides that lands of the United States included in any proposed power project are reserved from entry, location, or other disposal under the public land laws. Lands classified for powersite purposes are considered withdrawn under section 24 of the Federal Power Act, supra, until the land is declared open to location, entry, or selection. Appellant moved onto the land after she filed her application. Her use and occupancy, commencing at a time when the land was not subject thereto, constitutes a trespass and gives rise to no rights. Charles L. John, 42 IBLA 260 (1979). Such land does not become available until an order of restoration is issued. Carmel J. McIntyre, 67 IBLA 317 (1982).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Will A. Irwin C. Randall Grant, Jr.
Administrative Judge

Administrative Judge

^{2/} Recognition of the fact that the Department is bound by the decision of the Secretary of Agriculture would not preclude this Board from asking the Secretary of Agriculture to reconsider the findings if the conclusory statement were unsupported by data. However, in the case before us, there would appear to be no useful purpose for doing so, as the appellant has occupied the land in trespass. The land was withdrawn from entry 8 years before her birth.

